

Memorandum

DATE: 8/11/06

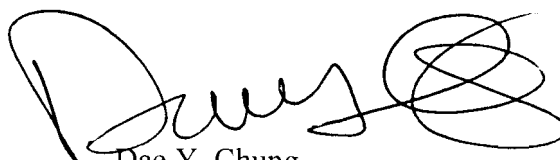
REPLY TO
ATTN OF: EM-60 (Dr. James Shuler, 301-903-5513)

SUBJECT: Interpretation of DOE O 460.1B

TO: Paul Geoly, National Nuclear Security Administration, Office of Secure Transportation

The attached is provided in response to your request of July 31, 2006. "Interpretation of Department of Energy – DOE O 460.1B, DOE G 460.1-1, and DOE G 460.1-1 att." Michael Rossetti, of your staff, received an advance draft copy of this interpretation. His comments and questions were addressed and incorporated in the attached interpretation.

If you have any questions, please call Dr. James Shuler at 301-903-5513.



Dae Y. Chung
Headquarters Certifying Official
Safety Management and Operations
Office of Environmental Management

Attachment

cc w/att.:

James Shuler, EM-60

Michael Rossetti, SRF Training Branch

**Response to Paul Geoly, July 31, 2006, memorandum,
Interpretation of Department of Energy –
DOE O460.1B, DOE G 460.1-1, and DOE G 460.1-1 att.”**

General Comments:

DOE employees using DOE vehicles carrying DOE material: The transportation of Hazardous Materials by the Department of Energy (DOE) Federal employees for government purposes while in Government vehicles is not subject to the Hazardous Material Regulations. See 49 CFR 171.1(d) “*Functions not subject to the requirements of the HMR.* The following are examples of activities to which the HMR do not apply:” (5) “Transportation of a hazardous material in a motor vehicle, aircraft, or vessel operated by a Federal, state, or local government employee solely for noncommercial Federal, state or local government purposes.” [Note: Since 49 CFR 171.1(d) does not state in a government vehicle, the vehicle can be owned, leased, or rented by the government.]

DOE Contractors: The transportation of hazardous materials by contractors of DOE, even if they are using government owned vehicles, is subject to HMR. Under of 49 CFR 171.1 (a) Packaging, (b) Pre-transportation functions, and (c) Transportation functions wording similar to these is shown; “including each person under contract with any department, agency, or instrumentality of the executive, legislative, of judicial branch of the Federal Government who..”

DOE O 460.1B is applicable to National Nuclear Security Administration (NNSA) – DOE O 460.1B, Paragraph 3.a. Applicability, DOE/NNSA Elements. “Except for the exclusions in paragraph 3c, below, this Order applies to DOE/NNSA Elements shown in Attachment 1. The important exclusion for NNSA is 3c(3): Operations conducted under DOE O 461.1, PACKAGING AND TRANSFER OR TRANSPORTATION OF MATERIALS OF NATIONAL SECURITY INTEREST. DOE O 460.1B address “offsite shipments and onsite transfers of hazardous materials and for modal transport.”

DOE O 461.1A is for “offsite shipments of naval nuclear fuel elements, Category I and Category II special nuclear material (SNM), nuclear explosives, nuclear components, special assemblies, and other materials of national security interest; onsite transfers of naval nuclear fuel elements, Category I and II SNM, nuclear components, special assemblies and other materials of national security interest; and certification of packages for Category I and II SNM, nuclear components, and other materials of national security interest.”

Response to Clarification of Requirements:

1. *What does, “not comply with the HMR” mean? (Susan Denny Letter).*

The April 23, 1991 DOT letter from Judith S. Kaleta to Susan Denny was a response to a DOE letter asking for interpretation of the hazardous material regulations for that time

period. The statement above is from the sentence that states: "DOE, however, is not required to comply with the HMR when it offers or transports hazardous materials in a Government vehicle because those activities are presumed to be a governmental purposes and thus not in commerce." However the sentence that follows also applies: "DOE's contractors, however, must comply with the HMR even when the transportation is in a Government vehicle." On October 30, 2003, 49 CFR 171.1 was revised, and these regulations were replaced and more clearly state this interpretation. This revision clearly states that DOE contractors are subject to HMR. In addition, and more important to this question, 49 CFR 171.1(d)(5) clearly states "Transportation of a hazardous material in a motor vehicle, aircraft, or vessel operated by a Federal, state, or local government employee solely for noncommercial Federal, state, or local government purposes." –is not subject to the requirements of the HMR.

2. Can OST (Federal Agents/Federal Staff) utilize the 171.1(d)(5) exemption for training and operational purposes.

49 CFR 171.1(d)(5) states "Functions not subject to the requirements of the HMR. The following are examples of activities to which the HMR do not apply:" is not technically an exemption from the regulations, although it serves a similar purpose. The OST training and operations, as stated in this question, Federal employees are not subject to the HMR. However, OST is a NNSA Element, and therefore subject to the requirements of DOE O 460.1B and DOE O 461.1A. The majority, if not all "hazardous material shipments" made by OST would come under DOE O 461.1A. If OST makes a shipment of hazardous materials, and the materials are not subject to DOE O 461.1A they would be subject to DOE O 460.1B. OST personnel are issued ammunition and pyrotechnics to support and protect their shipments and to meet other OST operations and training requirements. These hazardous materials are considered in "use" for these operations and not hazardous material shipments and, therefore, are not subject to DOE O 460.1B.

3. Can OST (Federal Agents) utilize 171.1(d)(5) when "not in custody" of SNM?

Yes. See that answer to question number 2 above

4. Does OST (Federal Agents) utilize the 171.1(d)(5) exemption when it moves items under the National Security Exemption 173.7(b)?

The use of 173.7(b) comes under DOE O 461.1A and not DOE O 460.1B, therefore EM-60 can not provide an answer to your question.

5. Was the National Security Exemption 173.7 (b) written for OST Federal Agents of DOE Contractors?

The use of 173.7(b) comes under DOE O 461.1A and not DOE O 460.1B, therefore EM-60 can not provide an answer to your question.

6. *Is there a difference between training and operations?*

OST operations and training are not subject to HMR. DOE O 460.1B only address the shipment/movement (onsite) of hazardous materials and does not address training or operations. Ammunition, pyrotechnics, and other hazardous materials, which are in “use” for operational functions (which includes training) of OST, are considered in use and not transportation. If OST Federal Agents/Federal Staff are issued training munitions to be used in an exercise to train state/local agencies, DOD, or Other Federal Agencies, then the transport of these hazardous materials to the training site and use of these materials in the exercise; are considered “in use” and not subject to DOE O 460.1B

Response to SRF Training Branch positions:

1. *DOE Federal Employees (Federal Agents/Federal Staff) are not considered “in commerce” during operational and training purposes when operating Government Vehicles, regardless of the environment (i.e. – on-site, DOE or DOE property, or public highways and public environment). Under the above conditions when Federal employees transport Hazardous Materials, those materials are considered “in use.”*

OST operations, as described above, are not subject to HMR. OST operations are subject to DOE O 460.1B and DOE O 461.1A. See the #2 above – Response to Clarification of Requirements.

2. *All DOE issued ammunition and pyrotechnics, once issued to Federal Agents/Federal Staff are considered “in use,” therefore there is no requirement to show an “equivalent level of safety” in accordance with DOE O 460.1B and related guidance. For example, (in training and operational) Federal Agents may carry issued hazardous materials in tactical pouches vs. shipping containers.*

EM-60 concurs with this interpretation. The hazardous materials issued to Federal Agents/Federal Staff are considered “in use” and are not subject to DOE O 460.1B.

3. *There is no written documentation stating a difference between operations and training as it relates to the transportation of Hazardous Materials. Federal Agents train in a variety of locations to include DOD, DOE, and Public Environment Venues to prepare for mission operations.*

See response #6 to Clarification of Requirements.

4. *Statement from DOE M 440.1-1 Explosive Safety Manual:*

The hazardous materials issued to Federal Agents/Federal Staff are considered “in use” and are not subject to DOE O 460.1B.

Requirements of DOE O 461.1A:

EM-60's has provided interpretations of HMR and DOE O 460.1B, we have not provided guidance on DOE O 461.1A because it is not a EM-60 Order. For example, your third from the last paragraph stated:

Currently OST Federal Agents are required to store 1.2D 40mm munitions in DOT approved containers while performing mission operations (Transporting SNM in convoy operations). This interpretation has not allowed Federal Agents to carry required munitions in a tactically sound manner.

Under DOE O 460.1B, the carriage of munitions by OST Federal Agents/Federal Staff would be considered "in use" and not subject to DOE O 460.1B. However, in the above example, when transporting SNM, DOE O 461.1A would apply and not DOE O 460.1B. If for this example, DOE O 461.1A required this action, then OST Federal Agents/Federal Staff would be required to meet the requirement. Questions concerning requirements from DOE O 461.1A should be address to NNSA.